No. 50. OF OCTOBER TERM, 1905.

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IN THE

Supreme Court of the United States.

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IN EQUITY.

Beryl F. Carroll, Auditor of State of the State of Iowa, Appellant,

vs.

The Greenwich Insurance Company of New York *et al.*, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEES.

(File No. 19,399.)

JOHN G. JOHNSON,
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IN THE SUPREME COURT OF THE UNITED STATES.

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No. .

APPELLEES' BRIEF.

I. STATEMENT OF FACTS.

The Greenwich Insurance Company, a corporation and citizen of the State of New York, in connection with some twelve other insurance corporations, such corporations having been created by the laws of the States of New York, Pennsylvania and Connecticut and Great Britain and Canada, as complainants, on the 12th of March, 1903, filed their bill in equity in the Circuit Court of the United States, in and for the Southern District of Iowa, against Beryl F. Carroll, Auditor of State, of the State of Iowa, and in such bill alleged their corporate existence and citizenship, and further alleged that for many years prior to the filing of the bill these several companies had made application in due form to be permitted to do business in the State of Iowa, and, in connection with such applications, had filed with the Auditor

of State written instructions, under seal, authorizing said Auditor to acknowledge service of notice, and further filed with said Auditor a certified copy of their charters and articles of incorporation; had further filed detailed statements of their capital stock, and such further statements as are provided for by the statutes of the State of Iowa; had paid all fees required by law to the State of Iowa, and had thereupon been permitted to carry on the business of fire insurance companies within the State of Iowa.

It was further alleged that each of said complainants had for many years established and maintained, with the specific consent of the authorities of the State of Iowa, extensive agencies in said State, and had built up and maintained an extensive business therein, and now have a large number of outstanding contracts of insurance upon property and with citizens of the State of Iowa.

It was further alleged that there were not less than eighty-five foreign fire insurance companies doing business in the State of Iowa.

It was further charged that by section 1754 of the Code of Iowa, it is provided:—

> "It shall be unlawful for two or more fire insur-
> "ance companies doing business in this State, or for
> "the officers, agents or employees of such companies,
> "to make or enter into any combination or agree-
> "ment relating to the rates to be charged for insur-
> "ance, the amounts of commissions to be allowed
> "agents for procuring the same, or the manner of
> "transacting the fire insurance business within this
> "State, and any such company, officer, agent or em-
> "ployee violating this provision shall be guilty of a
> "misdemeanor."

That by section 1755 of the Code it is made the duty of the Auditor of State to summarily summon before him for examination, under oath, any officer or agent of any such company suspected of violating the provision of said section 1754, and, upon complaint being made in

writing by two or more residents of the State, charging any company, under oath, with violating the provisions of said section, it is made the duty of such Auditor to summon before him any officer, agent, or employee of such company, and if, upon examination, he shall determine that such company is guilty of a violation of said section, or if any officer, agent or employee so summoned shall fail to appear, to issue an order revoking the authority of any such company to transact business within this State, and providing that thereafter such company shall not be permitted to do business in the State within a period of one year.

Section 1754 further provides that, upon conviction, such company shall be subject to a penalty of not less than one hundred or more than five hundred dollars.

It is further charged that fire insurance companies many years ago, in this and other commercial countries, began to collect and preserve full, careful and accurate accounts of fires, their cause, origin and all other attendant circumstances, and to subject the mass of data to analysis and classification for the purpose of ascertaining with a reasonable degree of certainty what was the general average of fires and the losses arising therefrom with the different classes of risks, whereby it became possible to ascertain, and was ascertained, what was the real, true and fair value of risks taken and assumed by parties who insure property against losses by fire.

It was further charged that, in doing business in the State of Iowa, the complainant companies, and other fire insurance companies, are confronted with new and varying conditions, all of which affect the value of risks of fire insurance, and an examination of these conditions, relating to the method of constructing buildings, the material of which they are composed, their location and consequent exposure to fire from adjacent property, the kind of business carried on in said buildings, the fire protection in the various towns and cities of the State, and an almost infinite variety of conditions bearing on loss by fire, are necessary in order that it may be

ascertained what is the real, true and fair value of risks of fire insurance to be taken and assumed by companies issuing contracts of fire insurance in this State.

It was further alleged that it is essential that such companies be permitted to avail themselves not only of their own experience but of the experience of other fire insurance companies, and that all data obtainable as to the cause, origin and circumstances connected with fires, under the varying circumstances by which they were surrounded, be gathered together in one mass and subjected to scientific analysis and classification, so that it may be ascertained with a reasonable degree of certainty what is the general average of fires, and the extent of losses therefrom, arising out of certain classes of risks, and thereby the real, true and fair value of such risks definitely and scientifically ascertained.

It was further charged that, in order to ascertain the true and equitable rates to be charged for the different classes of insurance, it is necessary that complainants and other fire insurance companies doing business in Iowa combine their experiences in the manner aforesaid, and deduce therefrom the just and true value of the several classes of risks, and complainants, and those for whom they sue, are desirous, when, as the result of their combined experiences, the true value of risks are ascertained, to charge such sum for the various classes of risks as shall represent and be the real, true and fair value of the risks taken and assumed by them.

It was further charged that complainants and other fire insurance companies are compelled to employ some person to ascertain from such experience as is obtainable the fair and just value of the risks to be assumed, and, owing to the limited experience of each company, a much more accurate rate can be ascertained if drawn from the combined experiences of all of the various companies doing business in Iowa; that the expense of such method of ascertaining the true value of the risk to be assumed would be greatly decreased if the companies were able to obtain these combined experiences by having the matter placed in the hands of some person em-

ployed by all of the companies for the purpose of ascertaining the just and equitable value of the risks to be assumed by them.

It was further charged (paragraph 10 of the bill) that complainants are desirous of combining their experiences and subjecting the data gathered by them to a person to be employed by complainants and other fire insurance companies similarly situated for the purpose of analyzing and classifying such experiences, to the end that the just and equitable value of the charges to be made for various risks of insurance be established; that complainants are also desirous of conferring, consulting and agreeing as to what classes of risks are non-insurable, as to what shall regarded as moral hazards, and what shall be regarded as physical hazards, as to how various risks shall be classified, and as to other matters relating to the manner of doing business, to the end that the most efficient services can be rendered to property owners and citizens of Iowa desiring fire insurance, and to the end that just and equitable rates of insurance may be ascertained upon the various classes of risks, all of which would be beneficial not only to complainants and other fire insurance companies doing business in the State of Iowa, but will also be beneficial and conducive to the welfare of the people of the State.

It is further charged, upon information and belief, that, if complainants proceed in the manner above set out to determine just, fair and reasonable rates of insurance, and proper methods of conducting business, the defendant, the Auditor of State, will proceed, under the provisions of sections 1754 to 1757 of the Code of Iowa, to attempt to deprive complainants of their right to do business in the State of Iowa, destroy the business which they have established, create a multiplicity of suits, and do great and irreparable injury to complainants and their business.

It is further charged:—

First.—That said section 1754, so far as it prohibits any combination or agreement relating to the rates to

be charged for insurance, the amount of commissions to be allowed agents for procuring the same, and the manner of transacting fire insurance within the State, is void and in violation of section 6 of article I. of the Constitution of the State of Iowa, which provides:—

> "All laws of a general nature shall have a uniform "operation; the general assembly shall not grant to "any citizen or class of citizens, privileges or immu- "nities, which upon the same terms shall not equally "belong to all citizens."

Second.—That said several sections of the Code of Iowa, 1754 to 1757, are in violation of article XIV. of the amendments to the Constitution of the United States, wherein it is provided:—

> "No State shall deprive any person of life, liberty, "or property, without due process of law, nor deny "to any person within its jurisdiction the equal pro- "tection of the laws."

Third.—That such statutes are in violation of section 10 of article I. of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts.

Proper appearance was made in this proceeding, and the defendant, appearing by his counsel, the Attorney-General, demurred to the bill of complaint, which demurrer, although stating several grounds, was practically upon the ground that the statements of the bill did not entitle the complainants to any relief.

The demurrer was submitted to the Circuit Court, and, upon full hearing, was overruled. The written opinion of the Circuit Court is reported in case of Greenwich Insurance Company *et al. vs.* Carroll, 125 Fed., 121.

The complainant elected to stand upon the demurrer, and final decree in the Circuit Court was rendered, enjoining defendant, as Auditor of State, and his successors in office, from enforcing the provisions of the sections

above referred to, the lower court having determined that such statutes were in violation of the Fourteenth Amendment to the Constitution of the United States.

II. BRIEF OF ARGUMENT.

I.

THE FEDERAL COURT IN EQUITY HAS JURISDICTION TO PASS UPON THE VALIDITY OF A STATUTE CLAIMED TO BE VOID AS IN VIOLATION OF THE CONSTITUTION, WHEN THE ENFORCEMENT OF SUCH STATUTE WILL CREATE A MULTIPLICITY OF SUITS OR CAUSE GREAT AND IRREPARABLE INJURY, AND HEREIN AN ACTION OF THIS CHARACTER IS NOT AN ACTION AGAINST THE STATE.

Osborn *vs.* United States Bank, 9 Wheaton, 738;
Pennoyer *vs.* McConnaughy, 140 U. S., 1;
Scott *vs.* Donald, 165 U. S., 107;
City of Hutchinson *vs.* Beckham, 118 Fed., 399 (Eighth C. C. A.).

II.

CORPORATIONS EQUALLY WITH INDIVIDUALS MAY INVOKE THE AID OF THE FEDERAL CONSTITUTION, BECAUSE THEY ARE PERSONS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Acts whose constitutionality is attacked are not made conditions to corporate admission within the State, or to corporate existence.

Santa Clara County *vs.* Southern Pacific Ry., 118 U. S., 394;
Pembina Mining Co. *vs.* Pennsylvania, 125 U. S., 181-189;
Missouri Pacific Ry. *vs.* Mackey, 127 U. S., 205;
M. & St. L. Ry. *vs.* Herrick, 127 U. S., 210;

M. & St. L. Ry. *vs.* Beckwith, 129 U. S., 26;
Charlotte Railway *vs.* Gibbes, 142 U. S., 386;
Covington Turnpike Co. *vs.* Sandford, 164 U. S., 578;
Gulf, Colorado & Santa Fé Ry. *vs.* Ellis, 165 U. S., 150;
Ins. Co. *vs.* Morse, 20 Wallace, 451;
Cargill Co. *vs.* Minn., 180 U. S., 452;
N. Y. Ins. Co. *vs.* Smith, 41 S. W., 687.

Iowa statutes which especially provide for foreign corporations doing business in Iowa, sections 1637-1639, Code of 1897. Special provisions as to foreign insurance companies doing business in Iowa, sections 1721-1725, Code of 1897.

III.

THE LEGISLATURE OF A STATE, UNDER THE GUISE OF PROTECTING PUBLIC INTERESTS, MAY NOT ARBITRARILY INTERFERE WITH PRIVATE BUSINESS, OR IMPOSE UNUSUAL AND UNNECESSARY RESTRICTIONS UPON LAWFUL OCCUPATIONS.

Lawton *vs.* Steele, 152 U. S., 133;
Allgeyer *vs.* Louisiana, 165 U. S., 578;
Lochner *vs.* New York, 25 S. C. R., 539;
State *vs.* Kreutzberg, 90 N. W., 1098 (Wis.)

IV.

UNDER THE GUISE OF POLICE REGULATION THE RIGHTS OF PERSONS AND PROPERTY CANNOT BE INVADED BY LEGISLATIVE ACTION, AND WHEN SUCH ACTION TAKES AWAY THE PROPERTY OF A CITIZEN, OR INTERFERES WITH HIS PERSONAL LIBERTY, IT IS THE PROVINCE OF THE COURTS TO DETERMINE WHETHER IT IS AN APPROPRIATE REMEDY FOR THE PRESERVATION OF THE SAFETY AND WELFARE OF SOCIETY.

Ritchie *vs.* People, 155 Ill., 98; 40 N. E., 454;
Bessette *vs.* People, 193 Ill., 334; 62 N. E., 219;

In re Jacobs, 98 N. Y., 98-107;
People *vs.* Marx, 99 N. Y., 377; 2 N. E., 29;
People *vs.* Gillson, 109 N. Y., 389; 17 N. E., 343.

V.

REASONABLE CONTRACTS IN RESTRAINT OF TRADE ARE NOT VOID OR AGAINST PUBLIC POLICY. THIS IS ESPECIALLY TRUE WHERE THE SUBJECT OF THE CONTRACT IS NOT A PRIME NECESSITY OR STAPLE OF COMMERCE.

Oregon Steam Navigation Co. *vs.* Winsor, 20 Wall., 69;
Fowle *vs.* Park, 131 U. S., 97;
Chicago Railway Co. *vs.* Pullman Co., 139 U. S., 89;
Northern Securities Co. *vs.* United States, 193 U. S., 361;
Smiley *vs.* Kansas, 196 U. S., 454;
Central Shade Roller Co. *vs.* Cushman, 143 Mass., 353; 9 N. E., 629;
Herriman *vs.* Menzies, 115 Cal., 16; 35 L. R. A., 318;
Manchester & L. R. R. *vs.* Concord, 20 Atl., 385.

VI.

ISSUING POLICIES OR CONTRACTS OF INSURANCE IS NOT COMMERCE.

Paul *vs.* Virginia, 8 Wall., 168-183;
Nathan *vs.* Louisiana, 8 Howard, 73;
Insurance Co. *vs.* Massachusetts, 10 Wall., 566;
Doyle *vs.* Insurance Co., 94 U. S., 535;
Philadelphia Fire Assn. *vs.* New York, 119 U. S., 110;
Queen Insurance Co. *vs.* State, 86 Texas, 250; 24 S. W., 397-404.

VII.

CASES IN WHICH LEGISLATION HAS BEEN HELD TO BE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES (*a*) WHERE THE CLASSIFICATION HAS BEEN ONE OF ARBITRARY SELECTION; (*b*) WHERE THE LIBERTY OF CONTRACT HAS BEEN ARBITRARILY AND WITHOUT JUST CAUSE INVADED.

Cooley on Constitutional Limitations (5th ed.), sections 484-485-486;

Cooley on Constitutional Limitations (6th ed.), pages 481-483;

Allgeyer *vs.* Louisiana, 165 U. S., 578;

Gulf Railway Co. *vs.* Ellis, 165 U. S., 150;

Cotting *vs.* Kansas City Stock Yards, 183 U. S., 79;

Connelly *vs.* Sewer Pipe Co., 184 U. S., 540;

Lochner *vs.* New York, 25 S. C. R., 539;

State *vs.* Haun, 61 Kan., 504; 59 Pac., 341;

Frorer *vs.* People, 141 Ill., 171; 31 N. E., 397; 16 L. R. A., 495;

State *vs.* Goodwill, 33 West Va., 179-182; 10 S. E., 285; 6 L. R. A., 623;

State *vs.* Fire Creek Coal Co., 33 West Va., 188; 6 L. R. A., 359;

State *vs.* Loomis, 115 Mo., 307-315; 22 S. W., 350; 21 L. R. A., 789;

Godcharles *vs.* Wigeman, 113 Pa. St., 431-437; 6 Atl., 354;

Dibrell *vs.* Morris Heirs, 15 S. W., 87-95;

State *vs.* Kreutzberg, 90 N. W., 1098 (Wis.);

Republic Iron & Steel Co. *vs.* State, 66 N. E., 1006 (Ind.);

Vanzunt *vs.* Waddell, 2 Yerger, 260-270;

Millett *vs.* People, 117 Ill., 294; 7 N. E., 631-634;

Ritchie *vs.* People, 155 Ill., 98; 40 N. E. 454; 29 L. R. A., 79;

Harding *vs.* People, 160 Ill., 459; 43 N. E., 624; 32 L. R. A., 445;

Eden *vs.* People, 161 Ill., 296; 43 N. E., 1108; 32 L. R. A., 659;
Chicago *vs.* Netcher, 183 Ill., 104; 48 L. R. A., 261; 55 N. E., 707;
Bailey *vs.* People, 190 Ill., 28; 54 L. R. A., 838;
Johnson *vs.* Railway, 43 Minn., 222; 45 N. W., 156; 8 L. R. A., 419;
Sutton *vs.* State, 96 Tenn., 696; 36 S. W., 697; 33 L. R. A., 589;
State *vs.* Garbroski, 111 Iowa, 498;
State *vs.* Jackman, 42 L. R. A., 438 (N. H.);
South & North Alabama Ry. *vs.* Morris, 65 Ala., 193-199;
Chicago & St. Louis Ry. *vs.* Moss, 60 Miss., 641;
Wilder *vs.* Chicago & West Michigan Ry., 70 Mich., 382-384;
St. Louis Railway *vs.* Williams, 49 Ark., 492; 5 S. W., 883;
San Antonio Railway *vs.* Wilson, 19 S. W., 910;
Wallace *vs.* Railway, 94 Ga., 732; 22 S. E., 579;
New York Life Ins. Co. *vs.* Smith, 41 S. W., 680;
Street *vs.* Varney Electrical Co., 61 L. R. A., 155;
People *ex rel.* Rodgers *vs.* Color, 166 N. Y., 1; 52 L. R. A., 814; 59 N. E., 716.

III. ARGUMENT.

I. JURISDICTION.

The bill recites the diverse citizenship of the parties complainants, all being corporations organized and existing by authority of other States, or foreign countries, than the State of Iowa, the defendant being a citizen and resident of the State of Iowa. The amount in controversy is alleged to be in excess of $2000, and the construction of the Federal Constitution is directly involved.

This court has frequently recognized the propriety of testing the constitutionality of a law in proceedings sim-

ilar to the one at bar. The bill charges fully the necessity on the part of the complainants to exercise privileges and rights prohibited by law; the apprehension on their part, that if such rights and privileges are exercised, the law will be enforced; and that the enforcement of such law will create a multiplicity of suits and result in irreparable injury to complainants. Under these circumstances Federal courts have not hesitated to assume jurisdiction of such controversies.

In case of Osborn *vs.* United States Bank, 9 Wheaton, 738, this court, by Chief Justice Marshall, determined the constitutionality of a statute of the State of Ohio which sought to deprive the Bank of the United States of the right and privilege of doing business in the State of Ohio by levying upon said bank annual taxes for each office of the bank in the State of Ohio in the sum of $50,000, an amount which, if levied, would be prohibitive. The question of jurisdiction, and the right to hear and determine such controversy, was fully considered at paragraphs 5 and 6 of the opinion, and, in discussing the question as to whether or not, upon the allegations of the bill, the Auditor would execute the law, the court said:—

> "The appellants allege that the original bill con-
> "tains no allegation which can justify the application
> "for an injunction, and treat the declarations of
> "Ralph Osborn, the Auditor, that he should execute
> "the law, as the light and frivolous threats of an indi-
> "vidual, that he would commit an ordinary trespass.
> "But surely this is not the point of view in which the
> "application for an injunction is to be considered.
> "The legislature of Ohio had passed a law for the
> "avowed purpose of expelling the Bank from the
> "State; and had made it the duty of the Auditor to
> "execute it as a ministerial officer. He had declared
> "that he would perform this duty. The law, if exe-
> "cuted, would unquestionably effect its object, and
> "would deprive the Bank of its chartered privileges,
> "so far as they were to be exercised in that State. It
> "must expel the Bank from the State; and that is,
> "we think, a conclusion which the court might right-

"fully draw from the law itself. That the declara-
"tions of the Auditor would be fulfilled did not admit
"of reasonable doubt. It was to be expected that a
"person continuing to hold an office would perform
"a duty enjoined by his government, which was com-
"pletely within his power. This duty was to be re-
"peated until the Bank should abandon the exercise
"of its chartered rights."

At page 842, in determining that a proceeding asking for an injunction was an appropriate remedy, the court said, at the conclusion of a full discussion of this subject:—

"The same conservative principle which induces
"the court to interpose its authority for the protec-
"tion of exclusive privileges, to prevent the com-
"mission of waste, even in some cases of trespass, and
"in many cases of destruction, will, we think, apply
"to this."

See also—

Pennoyer *vs.* McConnaughy, 11 S. C. R., 699; 140 U. S., 1;
Scott *vs.* Donald, 17 S. C. R., 265; 165 U. S., 107;
City of Hutchinson *vs.* Beckham, 118 Fed., 399 (Eighth C. C. A.).

II. CORPORATIONS, EQUALLY WITH NATURAL PERSONS, HAVE THE RIGHT TO INVOKE THE PROTECTION OF THE CONSTITUTION. THE OBSERVANCE OF THE LAWS IN CONTROVERSY WAS NOT MADE A CONDITION OF THE RIGHT TO DO BUSINESS IN IOWA.

The complainants in this case, while organized under jurisdictions outside of the State of Iowa, are doing business in the State not alone with permissive authority or acquiescence, but upon direct invitation and specific authority granted by virtue of statutory enactment, which, when complied with, gives to foreign corporations all of the rights, privileges, and protection to which corpora-

tions organized under the laws of the State of Iowa would be entitled.

Section 1637 of the Code of 1897 provides:—

"Any corporation for pecuniary profit, other than "for carrying on mercantile or manufacturing busi- "ness, organized under the laws of another State, or "of any Territory of the United States, or of any for- "eign country, which has transacted business in the "State of Iowa since the first day of September, "1886, or desires hereafter to transact business in "this State, and which has not a permit to do "such business, shall file with the Secretary of "State a certified copy of its articles of incorpora- "tion duly attested, accompanied by a resolution of "its board of directors or stockholders authorizing "the filing thereof, and also authorizing service of "process to be made upon any of its officers or agents "in this State engaged in transacting its business, "and requesting the issuance to such corporation of "a permit to transact business in this State; said "application to contain a stipulation that such per- "mit shall be subject to the provisions of this chap- "ter. Before such permiit is issued, the said corpora- "tion shall pay to the Secretary of State the same "fee required for the organization of corporations in "this State, and if the capital of such corporation is "increased, it shall pay the same fee as is in "such event required of corporations organized "under the law of this State. Any corporation trans- "acting business in this State prior to the first day of "September, 1886, shall be exempt from the pay- "ment of the fees required under the provisions of "this section. The Secretary of State shall there- "upon issue to such corporation a permit, in such "form as he may prescribe, for the transaction of "the business of such corporation, and upon receipt "of such permit said corporation shall be permitted "and authorized to conduct and carry on its busi- "ness in this State. Nothing in this section shall be "construed to prevent any foreign corporation from "buying, selling and otherwise dealing in notes,

"bonds, mortgages and other securities." (21 G. A., ch. 76, section 1.)

Section 1638 provides:—

"PERMIT. No foreign corporation which has not "in good faith complied with the provisions of this "chapter and taken out a permit shall possess the "right to exercise the power of eminent domain, or "exercise any of the rights and privileges conferred "upon corporations, until it has so complied here- "with and taken out such permit." (Same, section 2.)

Section 1639 provides:—

"PENALTY. Any foreign corporation that shall "carry on its business in violation of the provisions "of this chapter in the State of Iowa, by its officers, "agents or otherwise, without having complied with "this statute and taken out and having a valid per- "mit, shall forfeit and pay to the State, for each and "every day in which such business is transacted and "carried on, the sum of one hundred dollars, to be re- "covered by suit in any court having jurisdiction; "and any agent, officer or employe who shall know- "ingly act or transact such business for such corpora- "tion, when it has no valid permit as provided herein, "shall be guilty of a misdemeanor, and for such "offense shall be fined not to exceed one hundred dol- "lars, or be imprisoned in the county jail not to "exceed thirty days, or by both such fine and impris- "onment, and pay all costs of prosecution. Nothing "contained in this chapter shall relieve any person, "company, corporation, association or partnership "from the performance of any duty or obligation now "enjoined upon or required of it, or from the pay- "ment of any penalty or liability created by the stat- "utes heretofore in force, and all foreign corpora- "tions, and officers and agents thereof, doing business "in this State shall be subject to all the liabilities, re- "strictions and duties that are or may be imposed "upon corporations of like character organized under

"the general laws of this State, and shall have no "other or greater powers." (Same section 4.)

In addition to the general provisions authorizing foreign corporations to do business in the State, there are specific provisions relating to foreign insurance companies, found at sections 1721 to 1725 of the Code of 1897.

Section 1721 provides:—

"FOREIGN COMPANIES—CAPITAL REQUIRED. No "insurance company, association or partnership in- "corporated, associated or organized under or by the "laws of any other State or any foreign government, "for the purposes specified in this chapter, shall di- "rectly or indirectly take risks or transact any busi- "ness of insurance in the State, unless possessed of "two hundred thousand dollars of actual paid up "capital, exclusive of any assets deposited in other "States and Territories for the special benefit or se- "curity of the insured therein; but the provisions of "this section shall not apply to mutual insurance "companies or associations specifically organized for "the purpose of and insuring a single class of prop- "erty only; and companies organized to insure plate "glass exclusively are not required to have a greater "capital than one hundred thousand dollars; but such "companies organized to insure against personal in- "jury, disablement or death resulting from traveling "or general accidents by land or water exclusively, "having an actual paid up capital of one hundred "thousand dollars and one hundred thousand dollars "cash surplus safely invested, exclusive of any assets "deposited in other States and Territories for the "special benefit or security of the insured therein, "shall be deemed to be possessed of two hundred "thousand dollars actual paid up capital within the "meaning of this section."

Section 1724 provides:—

"When any foreign company has fully complied "with the requirements of law, and become entitled

"to do business, the Auditor of State shall issue to "such company a certificate of that fact, which certifi- "cate shall be renewed annually on the first day of "March, if the Auditor is satisfied that the capital, "securities and investments of such company remain "unimpaired, and the company has complied with "the provisions of law applicable thereto."

The bill of complaint in this case specifically charges a full compliance with all provisions of the law by the various complainants in this case; the granting of authority to do business; and the large and valuable interests which each of the complainant companies has acquired and accumulated within the State of Iowa by reason of the permission heretofore granted by the authorities of said State to do business within its limits.

This court has frequently held that corporations of the kind and character of the complainants are persons within the meaning of constitutional provisions, and entitled to the protection of all such provisions the same as natural persons.

In case of Gulf, Colorado & Santa Fé Railway *vs.* Ellis, 165 U. S., 154, this court said:—

"It is well settled that corporations are persons "within the provisions of the Fourteenth Amend- "ment of the Constitution of the United States. (See "cases cited.) The rights and securities guaranteed "to persons by that instrument cannot be disregarded "in respect to these artificial entities called corpora- "tions any more than they can be in respect to the "individuals who are the equitable owners of the "property belonging to such corporations. A State "has no more power to deny to corporations the "equal protection of the law than it has to individual "citizens."

See—

Santa Clara County *vs.* Southern Pacific Ry., 118 U. S., 394;

Pembina Mining Co. *vs.* Pennsylvania, 125 U. S., 181-189;

Missouri Pacific Ry. *vs.* Mackey, 127 U. S., 205;
M. & St. L. Ry. *vs.* Herrick, 127 U. S., 210;
M. & St. L. Ry. *vs.* Beckwith, 129 U. S., 26;
Charlotte Railway *vs.* Gibbes, 142 U. S., 386;
Covington Turnpike Co. *vs.* Sandford, 164 U. S., 578.

Judge McPherson, in determining this question in the Circuit Court, very persuasively set out the reasons why foreign corporations are entitled to protect themselves against unconstitutional acts in the following language, 125 Fed., 124 (Record, page 20):—

"Chapter 4, title 9 of the Iowa Code, which chapter "includes the statutes now under consideration, af- "firmatively makes two among other things appear: "(1) That it is the policy of this State to invite "solvent and reliable foreign insurance companies "to come into this State, particularly for the purpose "of giving the people the benefit of competition, and "partly for the purpose of obtaining revenue for the "State treasury; and both purposes are subserved. "(2) That it is the duty of the State Auditor to li- "cense such companies to do business in the State, if "upon investigation he finds them solvent and finan- "cially worthy. Such being the policy of the State, "and such being the duty of the Auditor, he cannot "deny the foreign companies, of the kind as above "described, from receiving the proper certificate and "from doing an Iowa business. Should he undertake "to keep such a company out, the proper court will "by *mandamus* compel him to grant the authority, "and admit such company. This being so, he can- "not put them out, after they are once lawfully and "rightfully in, excepting by virtue of the power "lodged with him under a valid and constitutional "statute. * * * These companies having the "requisite capital, being solvent, having paid their "taxes and license fees, and having done all the "things required of them by the laws of Iowa and "the exactions of the Auditor, having been invited to

"do business in the State, and being now rightfully "here, they for the time being, and until the policy of "the State is changed, have the rights, neither more "nor less, than the Iowa companies enjoy, and illegal "exactions cannot be made upon them."

The Texas Court of Appeals, in New York Life Insurance Co. *vs.* Smith, 41 S. W., 687, decided this identical question, in sustaining the right of the New York Life Insurance Company to contest the constitutionality of a Texas statute. The court said:—

"Appellant, as a foreign insurance corporation, can "assail the said article as unconstitutional. It is true "that generally the State admits such corporations to "do business within its jurisdiction by comity, and "hence may subscribe such terms as it sees fit upon "which to admit them to transact business within its "jurisdiction, and these matters are solely for the dis-"cretion of the legislature. Appellant, as a foreign "insurance corporation coming into Texas to trans-"act its business, is bound by all the valid laws of "Texas, whatever they may be, so far as the same "are applicable to it; but the article in question is not "one of the prescribed conditions upon which it ob-"tained its right to transact business in this State. "There is no article or provision of our statutes that "we have been able to find that so declares the law. "* * * And the article of our statutes under con-"sideration is applicable alike to both foreign and do-"mestic life insurance companies."

For the purposes of this case it is not necessary for us to say that if foreign corporations are permitted to enter a State upon the express condition that they shall be subject to certain conditions and provisions, or that if domestic corporations are incorporated upon similar express conditions and provisions, they will not thereafter be permitted to challenge the constitutionality of such conditions and provisions imposed upon them in connection with the grant of the right to do business or to exist.

The intimation, however, in Fidelity Mutual Life Association *vs.* Mettler, 185 U. S., 326, that the payment of an attorney's fee in case of litigation of a life insurance policy "amounted to one of the conditions on which life "and health insurance companies were permitted to do "business in Texas," originated in the consideration of a statute which imposed the duty thus to pay as such condition. There is nothing in the Iowa law which made the provisions we are considering a condition of corporate entrance or existence.

We will endeavor to show (1) that no such provision as the one of which we complain is imposed upon foreign corporations as a condition of their right to do business in Iowa; and (2) that no such provision is imposed upon domestic corporations as a condition of their incorporation.

Foreign corporations are permitted to enter the State of Iowa and domestic corporations are incorporated in that State under general provisions containing no such condition.

The appellants were permitted to enter, and did enter, the State of Iowa before the Act of 1896 or 1897 became a law. Of course, a very large number of domestic corporations were incorporated before that date.

The provisions we are criticizing were enacted as part of a general law applicable to all corporations, no matter when they entered the State, and to all corporations, no matter when they were incorporated.

If they are unconstitutional as to the corporations which existed before the passage of the Act, even though otherwise constitutional as to the latter, they must fail altogether because of the failure of a law meant to be general in an essential point.

An examination of the law, however, puts beyond question our assertion that it is not imposed as a condition of foreign corporation entry or of domestic corporation existence.

The sole question is whether the provision was constitutional as part of a general enactment applicable alike to all corporation?

As we have said, the provisions of the law in controversy are not conditions upon which foreign insurance companies are permitted to do business in Iowa. No such conclusion can be drawn either from the terms or from the character of the Act.

The Act in question, as now found in the Revised Code of Iowa, includes sections 1754 to 1757, which are part of chapter IV. of title 9, and contains laws applicable to all insurance other than life.

The said sections are in the words following:—

"SEC. 1754.—COMBINATIONS. It shall be unlawful "for two or more fire insurance companies doing "business in this State, or for the officers, agents or "employees of such companies, to make or enter into "any combination or agreement relating to the rates "to be charged for insurance, the amount of commis- "sions to be allowed agents for procuring the same, "or the manner of transacting the fire insurance busi- "ness within this State; and any such company, offi- "cer, agent or employee violating this provision shall "be guilty of a misdemeanor, and on conviction "thereof shall pay a penalty of not less than one hun- "dred dollars nor more than five hundred dollars for "each offense, to be recovered in the name of the "State for the use of the permanent school fund." (26 G. A., ch. xxii., section 1.)

SEC. 1755.—REVOCATION OF AUTHORITY. The "Auditor of State is authorized to summon before "him, for examination under oath, any officer, agent "or employee of any such company suspected of vio- "lating any of the provisions of the preceding section, "and, on complaint to him in writing by two or more "residents of this State charging such company under "oath upon their knowledge or belief with violating "the provisions of the preceding section, he shall "summon any officer, agent or employee of said com- "pany before him for examination under oath; if "upon such examination, and that of any other wit- "ness produced and examined, he shall determine "that such company is guilty of a violation of any "of the provisions of the preceding section, or if any

"such officer, agent or employee after being duly sum-
"moned shall fail to appear or submit to examina-
"tion, the Auditor shall forthwith issue an order re-
"voking the authority of such company to transact
"business within this State, and it shall not there-
"after be permitted to do the business of fire insur-
"ance in this State at any time within one year there-
"from." (Same, section 2.)

"SEC. 1756.—APPEAL. Either party may appeal
"from the decision of the Auditor, made pursuant to
"the preceding section, to the district court of the
"county where the same was made, within twenty
"days from the time of the rendition of such decision,
"by serving a written notice of such appeal on the
"Auditor, and filing with the clerk of said court a
"good and sufficient bond for the payment of all costs
"on the appeal in case the decision shall be affirmed.
"On such appeal said court shall try the case *de novo*,
"as equitable causes are tried, and on such evidence
"as either party may produce, and may reverse, mod-
"ify or affirm the decision of the Auditor." (Same,
section 3.)

"SEC. 1757.—EVIDENCE. The statements and dec-
"larations made or testimony given by any officer,
"agent or employee in the investigation before the
"Auditor, or upon the hearing and trial before the
"district court, as provided in the two preceding sec-
"tions, shall not be used against the person making
"the same in any criminal prosecution against him."
(Same, section 4.)

These statutes were originally enacted as chapter XXII. of the 26th G. A., approved March 6th, 1896, long after complainants, and each of them, had been admitted to do business in the State of Iowa. Sections 1721 and 1724 of the same Code, which provide the terms under which foreign insurance companies can do business in Iowa, are continuations of the general expression of the law of Iowa as to foreign insurance companies as far back, at least, as section 1144 of the Code of 1873, and there is no language in the provisions providing for the terms

under which foreign insurance companies shall do business that would justify the conclusion that they were permitted to do business in Iowa upon their compliance with the provisions of all laws in force at the time that they were admitted into the State, or such as might be enacted after their admission. If this were true, the right accorded to all foreign corporations to contest the constitutionality of laws would be entirely nullified.

This court, in unmistakable terms, has said that the granting of a license by the authorities of a State to a foreign corporation to do business within its jurisdiction must not be considered as a waiver on the part of the insurance company, or as an acquiescence, on its part, that it will be bound by all laws, whether the same are or are not constitutional.

In Insurance Co. *vs.* Morse, 20 Wall., 451, this court held that a statute imposing an obligation upon insurance companies to refrain from removing actions to the Federal court was not a provision that bound the insurance companies, and that foreign insurance companies had the right to contest the constitutionality of such a statute after they had accepted the privilege of doing business in the State.

In the more recent case of Cargill Co. *vs.* Minnesota, 180 U. S., 468, where the right to carry on the business of storage and shipment of grain by foreign companies licensed by the State was in issue, in determining the right of a Wisconsin corporation to contest the constitutionality of the law, after such corporation had been licensed by the State, this court said:—

> "The defendant, however, insists that some of the "provisions of the statute are in violation of the Con-"stitution of the United States, and if it obtained the "required license, it would be held to have accepted "all of its provisions, and (in the same words of the "statute) 'thereby to have agreed to comply with the "'same.' Section 1. The answer to this suggestion is "that the acceptance of a license, in whatever form, "will not impose upon the licensee an obligation to re-

"spect or to comply with any provisions of the "statute or with any regulations prescribed by the "State Railroad and Warehouse Commission that "are repugnant to the Constitution of the United "States. A license will give the defendant full au- "thority to carry on its business in accordance with "the valid laws of the State and the valid rules and "regulations prescribed by the Commission. If the "Commission refused to grant a license, or if it "sought to revoke one granted, because the appli- "cant in the one case, or the licensee in the other, "refused to comply with statutory provisions or "with rules or regulations inconsistent with the Con- "stitution of the United States, the rights of the ap- "plicant or the licensee could be protected and en- "forced by appropriate judicial proceedings."

In the dissenting opinion of Justices Harlan and Brown, in Fidelity Life Association *vs.* Mettler, 185 U. S., 332, in commenting upon the effect of the State issuing license to a foreign corporation to do business, it was said:—

"It is one thing for a State to forbid a particular "foreign corporation or a particular class of for- "eign corporations from doing business at all "within its limits. It is quite another thing for "a State to admit or license foreign corporations to "do business within its limits and then subject them to "some statutory provision that is repugnant to the "Constitution of the United States. If a corporation, "doing business in Texas under its license or with "its consent, insists that a particular statute or regu- "lation is in violation of the Constitution of the "United States, and cannot therefore be enforced "against it, the State need only reply—such seems "to be the logical result of the present decision— "that the statute or regulation is a condition of the "right of the corporation to do business in the State, "and, whether constitutional or not, must be re- "spected by the corporation. Corporations created "by the several States are necessary to the conduct "of the business of the country; and it is a startling "proposition that a State may permit a corporation

"to do business within its limits, and by that act ac-
"quire the right to subject the corporation to regu-
"lations that may be inconsistent with the supreme
"law of the land."

The very clear import of the law under consideration will not justify a construction that its observance is a condition of the right on the part of foreign fire insurance companies to do business in Iowa. It is placed in a chapter applying to all insurance companies other than life. By its terms it applies only to fire insurance companies. The law admitting foreign companies is a general law, applicable to all insurance companies other than life, and there is no language and no expression in the Act from which it can fairly be claimed that, when a foreign fire insurance company complies therewith, it was meant that all laws, of every kind, theretofore and thereafter enacted, must be obeyed as a condition of doing business in Iowa.

In Norton *vs.* Shelby County, 118 U. S., 442, this court said:—

"An unconstitutional act is not a law; it confers
"no right; it imposes no duty; it affords no protec-
"tion; it creates no office; it is, in legal contempla-
"tion, as inoperative as though it had never been
"passed."

In Cooley's Constitutional Limitations (Fifth Edition), 224, it is said:—

"When a statute is adjudged to be unconstitu-
"tional, it is as if it had never been. Rights cannot
"be built up under it; contracts which depend upon
"it for their consideration are void; it constitutes a
"protection to no one who has acted under it, and
"no one can be punished for having refused obedience
"to it before the decision was made."

In Insurance Co. *vs.* Morse, 77 U. S., 445, this court held that an agreement of an insurance company, on condition of which it entered a State, derived no support from an unconstitutional statute and was void as it would have been had no such statute been passed.

In Barron *vs.* Burnside, 121 U. S., 186, this court, speaking through Mr. Justice Blatchford, said:—

> "In both of the cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the State court. In the present case no such agreement has been made, but the locomotive engineer was arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State court, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits. As the Iowa statute made the right to permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and the laws of the United States, the statute requiring the permit must be held to be void."

III. SECTIONS 1754-1757 OF THE CODE OF IOWA ARE IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

(A.) *IN LIMITING THE PROVISIONS OF THESE SECTIONS TO FIRE INSURANCE COMPANIES THERE IS AN ARBITRARY AND UNJUSTIFIABLE CLASSIFICATION. THE PROVISIONS OF THE STATUTE BEING IN GENERAL TERMS ARE APPLICABLE NOT ONLY TO ALL KINDS OF INSURANCE, BUT TO ALL KINDS AND BRANCHES OF COMMERCE AND TRADE.*

The sections of the Iowa Code referred to were originally enacted as chapter XXII. of the laws of the 26th

G. A., approved April 3d, 1896, the Act being entitled "An Act to prevent combinations between "fire insur- "ance companies and providing penalties therefor." The first section of the Act makes a misdemeanor, punishable by a pecuniary fine—

> "Any combination or agreement * * * by or "between two or more fire or other insurance com- "panies insuring property against casualties from the "elements, transacting business within this State, or "between the officers, agents, or employes of any "such companies, *relating to the rates to be charged for "insurance, the amount of commissions to be allowed "agents for procuring insurance, or the manner of trans- "acting the business of fire insurance within this State.*"

Section 2 provides for an unusual remedy, by granting the State Auditor, *on his own motion*, or on complaint made by two or more residents of the State, authority to summon any officer or employee of any fire insurance company to appear before him for examination, on his own motion when *suspected* of violating the provisions of the Act, or, on complaint, when charged with violation, and further provides for the issuance by him of an order suspending any company found guilty from doing business for one year.

Section 3 of the Act provides for an appeal to the district court, and section 4 provides that any evidence given before the Auditor shall not be used against any person giving same in any criminal prosecution.

At the time of the passage of this special Act there was in force in the State of Iowa a general statute prohibiting any corporation, partnership, association or individual from "creating, entering into or becoming a member of "a party to any pool, trust, agreement, contract, combina- "tion, confederation or understanding with any other cor- "poration, partnership, association or individual to regu- "late or fix the price of any article of merchandise or "commodity, or to fix or limit the amount or quantity of "any article, commodity or merchandise to be manufac-

"tured, mined, produced or sold in this State." See section 5060, Code of 1897.

Section 5062 provides that a violation of such section shall be punished, in the event of a corporation, by a fine of not less than one per cent. of its capital or amount invested nor more than twenty per cent. of same, or, in the case of an individual, by a fine of not less than five hundred nor more than five thousand dollars.

These provisions were originally enacted as chapter XXVIII. of the laws of the 23d G. A., passed May 6th, 1890.

A similar law to the one above referred to was construed by the Supreme Court of Iowa in case of Beechley *vs.* Mulville, 102 Iowa, 602, wherein it was held that insurance was a commodity, and the general statute applied to combinations in the matter of fire insurance, so that at the time of the passage of the law under consideration there was a general statute prohibiting combinations as to rates of fire insurance companies which applied equally to all kinds of business and all articles of merchandise or commodities to be manufactured, mined, produced, or sold in Iowa. The special character of this legislation and its arbitrary classification as to fire insurance companies is emphasized by this condition.

The specific and controlling objection to this law, so far as classification is concerned, is that it lays down general rules as to (1) combination as to rates, (2) commission to be allowed agents, and (3) method of doing business in the matter of fire insurance companies, which will apply with equal force to all kinds and classes of business; but these general rules, applicable to all classes of business, and especially applicable to all kinds of insurance, fire, life, accident, tornado, &c., by the terms of the law are limited to fire insurance only.

The fact that the subject is dealt with in a general law, applicable to all corporations, demonstrates that it is not one which, as between the different kinds of insurance companies, is properly the subject of classification.

In other words, the law does not create provisions pe-

culiarly applicable to fire insurance, nor does it make rules that apply with peculiar force to fire insurance by reason of any peculiar characteristics of that business as distinguished from any of the other many kinds of insurance or business, and these general rules could be, as they have been, applied with equal force to the conduct of any other business institution carried on by corporations, and especially to all other kinds of insurance contracts.

For instance, the Kansas anti-trust law, as set out *In re* Pinkney, 27 Pac., 179, includes by a specific enumeration insurance and interest charged for the use of money in the general terms of a law applicable to all classes of articles entering into trade or commerce, and all kinds of insurance and interest charges.

As to combination as to rates, any reason which can be urged against combinations as to rates in fire insurance can be urged with equal or greater force as to prices of an innumerable number of other rates and articles of general commerce. The selection of fire insurance as the only subject of these general rules and restrictions seems arbitrary and capricious in the extreme. The penalties for violations of this statute are unusual and unnecessary restrictions upon a private and lawful occupation, and would seem to be in clear violation of many of the general rules which have been adopted by this court.

In Bell's Gap Railroad *vs.* Pennsylvania, 134 U. S., 232, at page 237, this court said:—

> "Clear and hostile discriminations against particu-
> "lar persons and classes, especially such as are of an
> "unusual character, unknown to the practice of our
> "governments, might be obnoxious to the constitu-
> "tional prohibition."

In Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 293, in quoting from Kentucky Railroad Tax Cases, 115 U. S., 321-337, it was said that the rule of the Fourteenth Amendment of the Constitution—

> "Only requires the same means and methods to
> "be applied impartially to all the constituents of a

"class so that the law shall operate equally and uni-
"formly upon all persons in similar circumstances."

In the matter of classification, the courts have uniformly declined to permit legislatures to make arbitrary, unreasonable and unjustifiable classification, and to limit the application of general rules to a particular business or a particular interest which the legislature may desire to control, when such general rules are equally applicable and can apply with equal force to a large number of other interests or classes.

We believe the legislation in question falls clearly within the rules which have been laid down and in a number of instances enforced by this court.

Some general rules which have the approval of many of the highest courts are announced by Mr. Cooley in his work on Constitutional Limitations, page 484, 5th ed.:—

"Every one has a right to demand that he be
"governed by general rules, and a special staute
"which, without his consent, singles his case out as
"one to be regulated by a different law from that
"which is applied in all similar cases, would not be
"legitimate legislation, but would be such an arbi-
"trary mandate as is not within the province of free
"governments. Those who make the laws 'are to
" 'govern by promulgated, established laws, not to
" 'be varied in particular cases, but to have one
" 'rule for rich and poor, for the favorite at court
" 'and the countryman at plow.' This is a maxim
"in constitutional law, and by it we may test the au-
"thority and binding force of legislative enactment."

And at page 486, 5th ed., of the same work it is said:—

"The doubt might also arise whether a regulation
"made for any one class of citizens, entirely arbitrary
"in its character, and restricting the rights, privileges,
"or legal capacities in a manner before unknown to
"the law, could be sustained, notwithstanding its
"generality. Distinctions in these respects must rest
"upon some reason upon which they can be de-

"fended—like the want of capacity in infants and in-
"sane persons; and if the legislature should under-
"take to provide that persons following some speci-
"fied lawful trade or employment should not have
"capacity to make contracts or to receive convey-
"ances, or to build such houses as others were al-
"lowed to erect, or in any other way to make such use
"of their property as was permissible to others, it
"can scarcely be doubted that the Act would trans-
"cend the due bounds of legislative power, even
"though no express constitutional provision could
"be pointed out with which it would come in con-
"flict. To forbid to an individual or a class the right
"to the acquisition or enjoyment of property in such
"a manner as should be permitted to the community
"at large would be to deprive them of *liberty* in par-
"ticulars of primary importance to their 'pursuit of
" 'happiness;' and those who should claim a right to
"do so ought to be able to show a specific authority
"therefor, instead of calling upon others to show how
"and where the authority is negatived."

In the case of Gulf, Colorado & Santa Fé Railway *vs.* Ellis, 165 U. S., 150, where a statute of the State of Texas provided, when claims for ~~cattle killed by~~ against railroads did not exceed the sum of fifty dollars, that, in addition to the amount of damages, an attorney's fee of ten dollars could be recovered, this court, after reviewing a large number of authorities, held the Texas statute unconstitutional. In the course of the opinion the court, at page 157, said:—

"But before a distinction can be made between
"debtors, and one be punished for a failure to pay his
"debts, while another is permitted to become in like
"manner delinquent without any punishment, there
"must be some difference in the obligation to pay,
"some reason why the duty of payment is more im-
"perative in the one instance than in the other.
"* * * But the penalty is not imposed upon all
"business corporations, all chartered for the pur-
"pose of private gain. The banking corporations,
"the manufacturing corporations and others like

"them, are exempt. Further, the penalty is im-
"posed not upon all corporations charged with the
"*quasi* public duty of transportation, but only upon
"those charged with a particular form of that duty.
"So the classification is not based on any idea of
"special privileges by way of incorporation, nor of
"special privileges given thereby for purposes of
"private gain, nor even of such privileges granted
"for the discharge of one general class of public
"duties."

Again, at page 159, the court said:—

"Indeed, the statute arbitrarily singles out one
"class of debtors and punishes it for a failure to
"perform certain duties—duties which are equally
"obligatory upon all debtors; a punishment not
"visited by reason of the failure to comply with any
"proper police regulations, or for the protection of
"the laboring classes or to prevent litigation about
"trifling matters, or in consequence of any special
"corporate privileges bestowed by the State. Unless
"the legislature may arbitrarily select one corpora-
"tion or one class of corporations, one individual
"or one class of individuals, and visit a penalty upon
"them which is not imposed upon others guilty of
"like delinquency this statute cannot be sustained."

Again, at page 161, it is said:—

"A law which would require all farmers who raise
"cotton to pay such a fee in cases where cotton was
"the subject-matter of litigation and the owners of
"this staple were parties to the suit would be so dis-
"criminating in its nature as to appear manifestly
"unconstitutional; and one which should confine the
"tax alone to physicians or merchants or ministers
"of the Gospel would be glaring in its obnoxious re-
"pugnancy to those cardinal principles of free gov-
"ernment which are found incorporated, perhaps, in
"the bill of rights of every State Constitution of the
"various Commonwealths of the American Govern-
"ment."

And finally, at page 165, the court said:—

> "It is apparent that the mere fact of classification "is not sufficient to relieve a statute from the reach "of the equality clause of the Fourteenth Amend- "ment and that in all cases it must appear not only "that a classification has been made, but also that it "is one based upon some reasonable ground—some "difference which bears a just and proper relation to "the attempted classification—and is not a mere "arbitrary selection."

We believe it impossible to distinguish in principle the rules and reasoning which control this court in the Ellis case and the propositions which are presented in the case at bar. The rule as to combination of rates applies with equal force to all business interests generally, especially to all other kinds of insurance, and how a selection of fire insurance can be made, to which shall be applied these general rules, without such selection being unfair and arbitrary, we are unable to determine.

The Texas Court of Appeals, in case of New York Life Insurance Co. *vs.* Smith, 41 S. W., 685, in following the Ellis case, held a statute of the State of Texas, which provided in all cases where recovery was had for loss as against life or health insurance companies, that there should be added to the amount of the loss twelve per cent. damages. The Texas court, in holding this statute in violation of the Federal Constitution, said:—

> "It will be readily seen that life and health insur- "ance companies are alone selected, of all other cor- "porations doing business in Texas, who may be sued "in our courts for the recovery of a death claim, who "may be made to pay twelve per cent. penalty upon "the claim, and a reasonable attorney's fee for the "collection of such claim. There are no other "debtors known to our law who are treated so "harshly by our lawmaking power. Fire and marine "insurance companies, banks, and all other corpora- "tions are exempt from such burdens. The classifica-

"tion of life and health insurance companies by the "legislature, upon which to visit the penalty provided "by article 3071, was certainly not based upon any "idea of special privileges granted to them, for it is "not made a condition by any article of our statutes "upon which foreign or domestic insurance com- "panies can do business in Texas that they should "pay such penalties as are prescribed in this article "for failing to pay their debts at maturity, and the "classification of life and death insurance com- "panies cannot be sustained upon the basis of the "business in which they are engaged. The business "in which life insurance companies are engaged is "not of a dangerous nature, requiring the exercise "by the legislature of its police powers. The statute "under consideration in this case does not proceed "upon the theory that such insurance companies owe "any duty to the public in regard to the payment of "their debts, more than other debtors owe to the pub- "lic. The object of this article is to compel such in- "surance companies to pay their debts for a death "claim within the time provided by the policy."

In Cotting *vs.* Kansas City Stock Yards Co., 183 U. S., 112, a Kansas statute which, among other things, discriminated in charges allowed by stock yards in favor of those yards doing an average daily business of one hundred head of cattle, three hundred head of hogs and three hundred head of sheep, as against stock yards doing a smaller business, was held unconstitutional. In the course of the opinion this court said:—

"There can be no pretence that a stock yard which "receives ninety-nine head of cattle per day a year "is not doing precisely the same business as one re- "ceiving one hundred and one head of cattle per day "each year. It is the same business in all its essen- "tial elements, and the only difference is that one "does more business than the other. But the receipt "of an extra two head of cattle per day does not "change the character of the business. If once the "door is opened to the affirmance of the proposi-

"tion that a State may regulate one who does much "business, while not regulating another who does "the same but less business, then all significance in "the guarantee of the equal protection of the laws is "lost, and the door is opened to that inequality of leg- "islation which Mr. Justice Catron referred to in the "quotation above made. This statute is not simply "legislation which in its direct results affects different "individuals or corporations differently, nor with "those in which a classification is based upon inher- "ent differences in the character of the business, but "is a positive and direct discrimination between per- "sons engaged in the same class of business and based "simply upon the quantity of business which each "may do. If such legislation does not deny the "equal protection of the laws, we are unable to per- "ceive what legislation would."

The quotation from Mr. Justice Catron in case of Vanzant *vs.* Waddel, 2 Yerger, 260-270, above referred to, is as follows:—

"Every partial or private law, which directly pro- "poses to destroy or affect individual rights, or does "the same thing by affording remedies leading to "similar consequences, is unconstitutional and void. "Were this otherwise, odious individuals and corpo- "rate bodies would be governed by one rule, and the "mass of the community, who made the law, by "another."

How applicable are these quotations to the Iowa statute! There is no inherent difference in rates for fire insurance and rates for life, accident and tornado insurance. If it so be that the business of fire insurance has for some reason become odious in Iowa, this law permits the corporate bodies engaged in this business to be governed by one rule, and the mass of the community by another.

In case of Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540-563, this court held the anti-trust law of Illi-

nois, which prohibited combinations in all ordinary business transactions except "agricultural products or live "stock while in the hands of the producer or raiser," unconstitutional. The Illinois law was held unconstitutional because it exempted one class from the general rule. The law under discussion is subject to the same criticism, because it confines the effect of a general rule to one particular class. In the Connolly case the court said:—

> "But different considerations control when the "State, by legislation, seeks to regulate the enjoy- "ment of rights and the pursuit of callings connected "with domestic trade. In prescribing regulations "for the conduct of trade, it cannot divide those en- "gaged in trade into classes and make criminals of "one class if they do certain forbidden things, while "allowing another and favored class engaged in the "same domestic trade to do the same things with im- "punity. It is one thing to exert the power of taxa- "tion so as to meet the expenses of government, and "at the same time, indirectly, to build up or protect "particular interests or industries. It is quite a dif- "ferent thing for the State, under its general police "power, to enter the domain of trade or commerce, "and discriminate against some by declaring that "particular classes within its jurisdiction shall be "exempt from the operation of a general statute "making it criminal to do certain things connected "with domestic trade or commerce. Such a statute "is not a legitimate exertion of the power of classifi- "cation, rests upon no reasonable basis, is purely arbi- "trary, and plainly denies the equal protection in the "laws to those against whom it discriminates."

At page 564, in considering the particular provisions of the Illinois law, the court said:—

> "Two or more engaged in selling dry goods, or "groceries, or meats, or fuel, or clothing, or medi- "cines, are, under the statute, criminals, and subject "to a fine, if they combine their capital, skill or acts "for the purpose of establishing, controlling, increas-

"ing or reducing prices, or of preventng free and un-
"restrained competition amongst themselves or
"others in the sale of their goods or merchandise;
"but their neighbors, who happen to be agricultur-
"ists and live stock raisers, may make combinations
"of that character in reference to their grain or live
"stock without incurring the prescribed penalty.
"Under what rule of permissible classification can
"such legislation be sustained as consistent with the
"equal protection of the laws?"

So, in the case at bar, all companies in Iowa selling life insurance may employ experts who shall classify risks, determine, as the result of experience and mutual comparison of business, just and reasonable rates to be charged for their contracts of indemnity, and agree as to what such charges shall be. The same reasons why this privilege should be extended to fire insurance companies exist. There can be no distinction as to the applicability of the general rule of the statute to these two classes of insurance, yet the fire insurance interests are prohibited, arbitrarily and without any just ground for distinction, from enjoying privileges which are extended to companies interested in life insurance.

In State *vs.* Loomis, 115 Mo., 307-314, 21 L. R. A., 789, where, by a statute of the State of Missouri, persons engaged in mining or manufacturing were prohibited from paying laborers in any other commodity or thing than lawful money of the United States, the Missouri court, in holding this law unconstitutional, because of its arbitrary classification, said:—

"But classification for legislative purposes must
"have some reasonable basis upon which to stand. It
"must be evident that differences which would serve
"for a classification for some purposes furnish no rea-
"son whatever for a classification for legislative pur-
"poses. The differences which will support class leg-
"islation must be such as in the nature of things fur-
"nish a reasonable basis for separate laws and regu-
"lations. Thus the legislature may fix the age at

"which persons shall be deemed competent to con-
"tract for themselves, but no one will claim that com-
"petency to contract can be made to depend upon
"stature or color of the hair. Such a classification
"for a purpose would be arbitrary and a piece of
"legislative despotism, and therefore not the law of
"the land."

Again the court said (page 315):—

"There can be no doubt but the legislature may
"regulate the business of mining and manufacturing
"so as to secure the health and safety of the em-
"ployes, but that is not the scope of the two sec-
"tions of the statute now in question. They single
"out those persons who are engaged in carrying on
"the pursuits of mining and manufacturing, and say
"to such persons, 'You cannot contract for labor pay-
" 'able alone in goods, wares, and merchandise.' The
"farmer, the merchant, the builder, and the numer-
"ous contractors employing thousands of men
"may make such contracts, but you cannot. They
"say to the mining and manufacturing employees,
"though of full age and competent to contract, still
"you shall not have the power to sell your labor for
"meat and clothing alone as others may."

This quotation emphasizes the argument in this case. If the regulation as to fire insurance was as to some matter peculiar and inherent to the business of fire insurance, there might be some excuse and some plausible reason why the law should be sustained, but the rule of the statute is general, and has no relation whatever to any inherent or peculiar characteristics of fire insurance.

In Eden *vs.* People, 161 Ill., 296, 43 N. E., 1108, where a statute of the State of Illinois, prohibiting barbers from plying their trade on Sunday, was held void, the court, at the conclusion of the opinion, said:—

"If the public welfare of the State demand that all
"business and all labor of every description except
"work of necessity and charity should cease on Sun-

"day, the first day of the week, and that day shall be "kept as a day of rest, the legislature has the power to "enact a law requiring all persons to refrain from "their ordinary callings on that day; and in order that "Sunday may be kept as a day of rest then all will be "placed on a perfect equality, and no one can com- "plain of an unjust discrimination. But when the "legislature undertakes to single out one class of "labor, harmless in itself, and condemn that, and that "alone, it transcends its legitimate powers and its "action cannot be sustained."

In Johnson *vs.* Railway Co., 45 N. W., 157, in construing an Act making railroad companies liable for negligence of co-employees while engaged in the operation of the road, the Minnesota court said:—

"Neither would it relieve the Act from the imputa- "tion of class legislation that it applies alike to all "railroads. It has been sometimes loosely stated that "special legislation is not class, 'if all persons brought " 'under its influence are treated alike under the " 'same conditions.' But this is only half the truth. "Not only must it treat alike, under the same condi- "tions, all who are brought 'within its influence,' but "in its classification it must bring within its influence "all who are under the same conditions."

In State of Iowa *vs.* Garbroski, 111 Iowa, 498, where a law requiring peddlers to take out license excepted from its provisions those who had served in the Union army or navy during the Civil War, the court, in holding the statute void, said:—

"All the authorities agree that the distinction in "dividing may not be arbitrary, and must be based "on differences which are apparent and reasonable."

And, in quoting from the case of Nichols *vs.* Walter, 37 Minn., 264, 33 N. W., 800, the court further said:—

"The true, practical limitation of the legislative "power to classify is that the classification shall be

"upon some apparent natural reason—some reason "suggested by necessity; by such a difference in the "situation, and circumstances of the subjects placed "in different classes as suggests the necessity or pro- "priety of different legislation with respect to them."

And again, at page 499, in quoting from the case of Sutton *vs.* State, 96 Tenn., 696, it was said:—

"Legislation, to be constitutional and valid, 'must " 'possess each of two indispensable qualities: *First*, " 'it must be so formed as to extend to and embrace " 'equally all persons who are or may be in the like " 'situation or circumstances; and, *secondly*, the classi- " 'fication must be natural and reasonable, and not " 'arbitrary or capricious.' "

In San Antonio Railway *vs.* Wilson, 19 S. W., 912, where a Texas statute, providing that, if railroad companies failed to pay claims for wages within fifteen days, there could be recovered a penalty of twenty per cent. of the amount due, was held void, the court said:—

"The doctrine is often stated that a statute is gen- "eral and uniform in its operation, and not subject "to the objection of being 'class legislation,' when it "affects equally all who are brought within the rela- "tions and circumstances provided for, though it may "not operate on every citizen. * * * But it by no "means follows that the legislature has the right to "impose any burden by simply placing it on all the "individuals of a certain class. It must rest upon "some reason upon which it could be defended."

Again, at page 913, it was said:—

"We think that an exception that undertakes to "single out a single class, and attach a penalty to a "failure to pay one class of their creditors, is not "failure to pay one class of their creditors, is not 'the " 'law of the land,' and cannot be sustained. * * * "The proposition here is to single out railway com-

"panies, and attach a penalty of twenty per cent. for "failure to pay servants' wages. It is impossible to "regard the excess beyond the amount of the debt "other than a penalty. It is not resting on contract, "but is a penalty or fine for punishment. It does not "apply to telegraph, telephone, or express companies, "warehouses, elevators, mills, street railways, gas and "electric companies, or hotels, nor to any of the "various enterprises of public necessity, interest, and "convenience to which it might properly be applied."

In Wilder *vs.* Chicago Railway, 70 Mich., 382, 38 N. W., 289, in holding a statute of the State of Michigan, authorizing the recovery of twenty-five dollars attorney's fees in claims against railroads on account of stock killed, void, the court said:—

"Here the legislature has granted special advan- "tages to one class, at the expense and to the detri- "ment of another, and has undertaken to make the "courts themselves the active agents in this injustice, "and to force them to impose penalties in the dis- "guise of costs upon railroad companies for simply "exercising, in certain cases, the common right of "every person to make a defense in the courts when "suits are brought against them."

In the recent case of Street *vs.* Varney Electrical Supply Co., decided April 1st, 1903, 160 Ind., 338, 61 L. R. A., 154-161, a statute of Indiana, requiring a minimum payment of not less than twenty cents an hour for unskilled labor employed upon any public work of State, counties, cities or towns, whether employed by the municipality direct or by a contractor, and further providing for a reasonable attorney's fee in case of suit brought, was held unconstitutional, the court saying:—

"Lastly, we think the statute obnoxious to the ob- "jection of class legislation. In fixing the minimum "rate of wages to be paid for unskilled labor to be "employed by counties, cities, and towns on public

"improvements, a classification is made which is un-
"natural and unconstitutional. The laboring men of
"the State may, for some purposes, constitute a class
"concerning which particular legislation may be
"proper. This classification has been recognized and
"sustained in statutes requiring the payment of
"wages in lawful money of the United States, forbid-
"ding the assignment of future and unearned wages,
"and in similar acts. But no legal and sufficient
"reason can be assigned for placing unskilled labor
"in a class by itself for the purpose of fixing by law
"the minimum rate of wages at which it shall be em-
"ployed by counties, cities, and towns on their public
"works. Why exclude the skilled mechanic from the
"benefit of the Act? Why compel the payment of a
"higher rate of wages to the unskilled laborer than
"may be demanded by the skilled mechanic for more
"difficult and important work, requiring special train-
"ing, experience, and a higher degree of intelligence?
"Unless the legislature has the power to fix the mini-
"mum rate of wages to be paid by counties, cities,
"and towns to carpenters, stone masons, bricklayers,
"plumbers, and painters employed on local improve-
"ments, treating each trade as a separate class, it has
"not the power to enact laws fixing the compensa-
"tion of unskilled laborers employed on similar
"works."

Cases of the foregoing character might be multiplied, but these are sufficient to illustrate the proposition for which we are contending, viz., that this law does not rest on any inherent difference between combinations as to rates of fire insurance and combinations as to prices of other kinds of insurance or other products manufactured, bought and sold.

The case at bar is easily distinguishable from those cases in which classification has been sustained. In each of the cases in which a classification has been sustained it was because the law applied some special rule because of some inherent difference in the class legislated about, from other like and similar classes. As an instance, we take

the valued policy law of Missouri, sustained in Orient Insurance Co. *vs.* Daggs, 172 U. S., 557; but fire insurance is the only class of insurance to which a valued policy law could properly be applied.

In Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 299, a collateral inheritance statute of the State of Illinois was sustained because of peculiarities attaching to that special kind of a tax.

In Missouri Railway *vs.* Mackey, 127 U. S., 205, the Kansas fellow-servant law, as applied to those operating railroads, was sustained because the operation of a railroad was a dangerous employment, justifying a proper classification.

M. & St. L. Ry. *vs.* Beckwith, 129 U. S., 26; Missouri Pacific Railway *vs.* Humes, 115 U. S., 512; Electric Co. *vs.* Dow, 166 U. S., 489; A., T. & S. F. Railway *vs.* Matthews, 174 U. S., 97, and St. Louis Railway *vs.* Paul, 173 U. S., 404, are all cases which, upon examination, can be readily distinguished from the case at bar.

We, therefore, submit that the selection of fire insurance companies, to which alone are applied the rules defined in this statute, though such rules are equally applicable to other innumerable classes, is an arbitrary and capricious selection by the legislature, and an attempt upon its part to lay burdens and restrictions upon the conduct of this class of business without any apparent reason why the same burdens should not be laid upon other branches of trade, commerce, banks, other insurance companies, loan and building associations, and other kindred kinds of business.

In 1862, the legislature of Iowa passed an Act providing that "every railroad company shall be liable for all "damages sustained by any person, including employees "of the company, in consequence of any neglect of its "agents, or by any mismanagement of its engineer or "other employees of the company."

In Deppe *vs.* C., R. I. & P. Ry. Co., 36 Iowa, 52, the constitutionality of this Act was challenged on the ground that it was class legislation, and hence violative of the

provisions of the State Constitution, providing that all laws of a general nature shall have uniform operation, and that all laws shall be general and of uniform operation throughout the State. The law was upheld on the ground that it had reference solely to employees engaged in the hazardous business of operating a railroad, and that as so construed and applied it was not class legislation. The following quotation from the opinion which is by Cole, J., contains an apt illustration of what is and what is not class legislation:—

> "But if the statute should be so construed as to "apply to all persons in the employ of railroad "corporations without regard to the business they "were employed in, then it would be a clear case of "*class legislation*, and would not apply upon the same "terms to all in the same situation, and hence would "be unconstitutional, and manifestly so. To illus- "trate, suppose a railroad company employ several "persons to cut the timber on its right of way where "it is about to extend its road, and the landowner "employs a like number of persons to cut the timber "on a strip of equal length alongside such right of "way. If one of each set of employees shall be in- "jured by the negligence of a co-employee, and the "employee of the railroad company can, under the "statute, maintain an action against his employer "and the other cannot, then it is clear that the law "does not apply upon the same terms to all in the "same situation. The law, then, would not have "uniform operation, but would be violative of the "Constitution just as much as a law that should pre- "scribe under the same circumstances different lia- "bilities for merchants, for mechanics, and for la- "borers. The manifest purpose of the statute was to "give its benefits to employees engaged in the haz- "ardous business of operating railroads. When thus "limited it is constitutional; when extended further "it becomes unconstitutional."

The provisions of the Constitution of the State of Iowa, and the Fourteenth Amendment of the Constitution of

the United States, are in spirit identical in so far as either prohibits the imposing of penalties upon particular persons or corporations, which are not imposed upon others under like circumstances.

If the fellow-servant law enacted by the legislature of the State of Iowa had been construed to apply to all employees of railroad companies, it would, in the opinion of the Iowa court, have been a clear case of class legislation, and manifestly unconstitutional. When limited in its application to those engaged in the hazardous occupation of handling trains, the classification was held a natural and not an arbitrary one in that it applies equally to all in the same condition. If construed to apply to all employees of railroad companies, the classification would have been arbitrary and unnatural because it did not apply to all similarly situated. This, the illustration used by the court makes very plain. The classification attempted by the law, the constitutionality of which is here challenged, is arbitrary and unnatural, and does not result from any apparent natural reason.

In their business methods in rates to be charged for insurance and in commissions to be paid agents, there is nothing which places fire insurance companies in a class by themselves. There is nothing in the business of fire insurance which distinguishes it from others in these particulars, or indeed from those engaged in other lines of business. When fire insurance companies combine their experiences for the purpose of arriving at the true cost of insurance, they are only doing what all other underwriters must do to arrive at the same result. Life insurance by the combined experience of underwriters has resulted in the compilation of standard, statistical tables from which actuaries determine the cost of insurance at a given age, and such rates are quite uniform in the different companies. These comparatively uniform rates, based upon ascertained cost of insurance, as determined by the combined experience of underwriters, could only have been arrived at by permitting life insurance companies to enter into combinations relating to the manner

of transacting business. While the rates that should be paid for risks assumed by fire insurance companies probably cannot be ascertained with the same degree of scientific accuracy that rates for life insurance can be determined, still it is apparent that there is no such distinction between the two kinds of underwriting as divides them into natural classes for the purpose of legislation of the character here complained of. The fact alleged in the bill of complaint that by combining their experiences, fire insurance companies may better ascertain the true value of risks than they otherwise could do is not peculiar to fire insurance companies, but is common to all underwriters. Paying agents a commission for soliciting business is a method of compensation not confined to fire insurance companies, nor even to underwriters. Books, stocks, lands and many other commodities are sold by agents who receive a commission for their services. Persons employing such agents are, in respect to commissions paid, in precisely the same situation as are fire insurance companies, and yet this law does not apply to them. It is clear the law does not in this particular apply upon the same terms to all in the same situation. If the law prohibited agreements between all employers as to the rates of commission to be paid agents, it would seem to be a question of much gravity whether such employers are a natural class separate from employers who compensate their agents at so much per day, week, month or year. When, however, a law separates into a class either land owners, book publishers, life insurance companies or fire insurance companies, and forbids such particular class of employers to enter into agreements as to the rate of commissions to be paid their agents, nothing can be clearer than that such a law does not apply on the same terms to all in the same situation, and is hence unconstitutional.

The Texas law, imposing a twelve per cent. penalty and attorneys' fees upon life and health insurance companies, was held by this court in the Mettler case not to be in violation of the provisions of the Fourteenth Amendment.

In answer to the contention that to impose a penalty upon life and health insurance companies for failing to pay their policy obligations when due, not imposed upon other insurance companies under like conditions, was a classification, arbitrary and unreasonable, this court said that the ground for placing life and health insurance companies in a different class from fire and marine insurance companies was very obvious. The obvious ground for the classification seems to have been thought to be the frequent necessity of prompt payment of these obligations to carry out the object and purpose of the policy holder. It certainly is true that sure and speedy assistance to the family deprived of the sustaining hand of the husband and father is in the main the reason for the existence of such companies. Hence, it may be said, life and health insurance companies furnish a natural class for legislation intended to insure prompt payment of their policy obligations. The case, though of course conceded to have been rightly decided, was nevertheless close to the dividing line, as is shown by the dissenting opinion. It, however, brings out prominently the constitutional requirement to valid legislation of this character, to wit: that the class to which the law applies must exist as a class before the law is enacted. The law-making body may not at the same time arbitrarily create the class and then legislate with regard to it. The true inquiry would seem to be, is the legislative enactment so framed as to apply to all similarly situated, upon like terms? Tried by this rule, we may find in the health and life insurance companies, when called upon to meet their policy obligations, that which separates them from other underwriters called upon to perform their policy obligations. Hence they are not, in this respect, similarly situated. The statute, the validity of which is here in question, classifies fire insurance companies for the purpose of legislation, with respect to matters in no way peculiar to this class. No possible reason can be assigned why fire insurance companies should be prohibited from contracting with each other as to rates of insurance,

which would not apply, with at least equal force, to life, health, accident, marine and the various other kinds of insurance. The same is true as to contracts concerning commissions to be paid agents, and as to the method of doing business. It is common knowledge that life insurance companies compensate their agents principally upon the commission basis. A law which prohibits fire insurance companies from agreeing as to commissions to be paid agents, leaving life insurance companies free to contract in this respect, is a classification so utterly devoid of natural causes or inherent reasons for its existence, as to place it well within those cases which hold such legislation to be obnoxious to the constitutional provisions of the States and of the United States, intended to insure equal rights under, and protection of, the laws.

(b.) *THE STATUTE IN QUESTION ARBITRARILY INTERFERES WITH THE RIGHT OF CONTRACT IN THE CONDUCT OF A BUSINESS PRIVATE IN ITS CHARACTER.*

The statute in question does not limit its prohibition to unreasonable contracts, but, on the contrary, absolutely prohibits all agreements, whether reasonable or unreasonable, so far as rates of insurance, commissions to be charged by agents, or manner of transacting the business are concerned. Fire insurance is not a matter of prime necessity; nor is it a staple article of commerce. It was described by this court, in case of Paul *vs.* Virginia, 8 Wall., 168-183, in the following language:—

> "Issuing a policy of insurance is not a transaction "of commerce. The policies are simple contracts of "indemnity against loss by fire, entered into between "the corporations and the assured, for a consideration "paid by the latter. These contracts are not articles "of commerce in any proper meaning of the word. "They are not subjects of trade and barter offered in "the market as something having an existence and "value independent of the parties to them. They are

"not commodities to be shipped or forwarded from "one State to another and then put up for sale. They "are like other personal contracts between parties "which are completed by their signature and the "transfer of the consideration."

The subject of fire insurance presents many questions where parties engaged therein shall at least have the power to make all reasonable contracts in the conduct of their business. The science of fire insurance depends upon, not the experience of any one, but of the joint experience of many, companies, covering large and distinct territory. The classification as to risks is a complex and scientific matter. There are innumerable kinds of property, improved real property situated in the country, without any sort of fire protection; real estate situated in small towns, having no adequate fire protection; real property wholly or partially constructed as fire proof; real property with and without dangerous exposures; buildings used for purposes that are not hazardous, and those used for purposes that are extra hazardous; the many kinds of personal property; some classes of business, such as hardware, not extra hazardous; other classes, such as millinery establishments, mills, manufacturing plants, etc., containing a greater or less degree of hazard; some risks which prudent companies absolutely prohibit. The value of insurance depends upon the solvency of the company. The solvency of the company depends upon its receiving reasonable rates for the risks which it insures. Reasonable rates depends upon the comparison, analysis, and classification of the joint experience of many companies. All of these factors show the necessity of combined action of, to some extent, joint arrangement, and of the mutual interchange of experiences, in order that there may be determined, with some degree of certainty what are and what are not reasonable rates. The general public, as well as the specific companies, have an interest in this determination.

All contracts which have a tendency to maintain prices are not illegal.

This question was considered by the Court of Appeals in case of United States *vs.* Trans-Missouri Freight Association, 58 Fed., 58, and, while the opinion was not affirmed by this court, the conclusion as to the right to enter into reasonable contracts in restraint of trade was not dissented from. In that opinion, after a full review of the authorities, the court said, page 72:—

> "From a review of these and other authorities, it "clearly appears that when the Anti-Trust Act was "passed the rule had become firmly established in the "jurisprudence of England and the United States "that the validity of contracts restricting competition "was to be determined by the reasonableness of the "restriction. If the main purpose or natural and in- "evitable effect of a contract was to suppress compe- "tition or create a monopoly, it was illegal. If a con- "tract imposed a restriction that was unreasonably "injurious to the public interest, or a restriction that "was greater than the interest of the party in whose "favor it was imposed demanded, it was illegal. But "contracts made for a lawful purpose, which were not "unreasonably injurious to the public welfare, and "which imposed no heavier restraint upon trade than "the interest of the favored party required, had been "uniformly sustained, notwithstanding their tendency "to some extent to check competition. The public "welfare was first considered, and the reasonable- "ness of the restriction determined under these rules "in the light of all the facts and circumstances of each "particular case."

In the dissenting opinion filed in this court in the above-entitled case, 17 S. C. R., 540; 166 U. S., 290, Mr. Justice White said, page 348:—

> "The tendency of modern thought and decisions "has been no longer to uphold in its strictness the "doctrine which formerly prevailed respecting agree- "ments in restraint of trade. The severity with which "such agreements were treated in the beginning has "relaxed more and more *by exceptions and qualifica- "tions*, and a gradual change has taken place, brought

"about by the growth of industrial activities, and the "enlargement of commercial facilities which tend to "render such agreements less dangerous, because "monopolies are less easy of accomplishment."

In the same opinion, in quoting from the case of Matthews *vs.* Associated Press, 136 N. Y., 333, it was said:—

"The latest decisions of courts in this country and "in England show a strong tendency to very greatly "circumscribe and narrow the doctrine of avoiding "contracts in restraint of trade. The courts do not "go to the length of saying that contracts which "they now would say are in restraint of trade are, "nevertheless, valid contracts, and to be enforced; "they do, however, now hold many contracts not "open to the objection that they are in restraint of "trade which a few years back would have been "avoided on that sole ground, both here and in Eng-"land. The cases in this court which are the latest "manifestations of the turn in the tide are cited in "the opinion."

In the opinion delivered by Mr. Justice Brewer in case of Northern Securities Co. *vs.* United States, 193 U. S., 361, it was said:—

"Congress did not intend to reach and destroy "those minor contracts in partial restraint of trade "which the long course of decisions at common law "had affirmed were reasonable and ought to be up-"held."

In Herriman *vs.* Menzies, 35 L. R. A., 318 (1896), where an association of stevedores had agreed upon a schedule of minimum prices, the court, in sustaining the agreement, said:—

"Combinations between individuals or firms for "the regulation of prices, and of competition in busi-"ness, are not monopolies, and are not unlawful as "in restraint of trade, so long as they are reasonable,

"and do not include all of a commodity or trade, or "create such restrictions as to materially affect the "freedom of commerce."

And, again, the court said (page 320):—

"The parties themselves, it is true, have combined "their business as severally carried on by them, and "have agreed to be bound by a schedule or rate of "charges to be fixed by the association; but this in "itself is not an unlawful restraint of trade, so long "as it does not appear that the rates to be charged "are unreasonable, or the restrictions such as to pre- "clude a fair competition with others engaged in "the business."

In Central Shade-Roller Co. *vs.* Cushman, 143 Mass., 353; 9 N. E., 629, where an agreement between the manufacturers of shade rollers as to prices and territory was sustained, the court said:—

"The agreement does not refer to an article of "prime necessity, nor to a staple of commerce, nor "to merchandise to be bought and sold in the market, "but to a particular curtain fixture of the parties' own "manufacture. It does not look to affecting compe- "tition from outside—the parties have a monopoly "by their patents—but only to restrict competition "in price between themselves. Even if such an "agreement tends to raise the price of the com- "modity, it is one which the parties have a right to "make. To hold otherwise would be to impair the "right of persons to make contracts, and to put a "price on the products of their own industry."

See—

Fowle *vs.* Park, 131 U. S., 97;
Chicago Railway Co. *vs.* Pullman Co., 139 U. S., 89.

It would seem, therefore, that, because of the peculiar character of insurance contracts, and of the necessity, in

fixing reasonable prices to have the benefit of general experience of many companies, a reasonable arrangement, which should provide only for reasonable compensation in the matter of insurance, would not be void at common law. The statute in question, selecting fire insurance as a special class, prohibits, not only reasonable arrangements, but all agreements with reference to the amount of rates to be charged. We believe that this is an arbitrary infringement upon the right of contract.

In Vanzant *vs.* Waddel, 2 Yerger, 260-270, quoted approvingly in the Cotting case, 183 U. S., 105, it was said:—

> "Every partial or private law, which directly pro-
> "poses to destroy or affect individual rights, or does
> "the same thing by affording remedies leading to
> "similar consequences, is unconstitutional and void.
> "Were this otherwise, odious individuals and corpo-
> "rate bodies would be governed by one rule, and the
> "mass of the community, who made the law, by
> "another."

In Tiedeman on Police Power, page 302, it is said:—

> "It is part of the natural and civil liberty to form
> "business relations free from the dictation of the
> "State; that a like freedom should be secured and en-
> "joyed in determining the conditions and terms of
> "the contract which constitutes the base of the busi-
> "ness relation or transaction. It is therefore, the
> "general rule that a man is free to ask for his wares
> "or his services whatever price he is able to get and
> "others are willing to pay."

In Allgeyer *vs.* Louisiana, 165 U. S., 589, in describing the liberty preserved by the Fourteenth Amendment of the Constitution, the court said:—

> "The liberty mentioned in that amendment means
> "not only the right of the citizen to be free from the
> "mere physical restraint of his person, as by incar-
> "ceration, but the term is deemed to embrace the
> "right of the citizen to be free in the enjoyment of

"all his faculties; to be free to use them in all lawful "ways; to live and work where he will; to earn his "livelihood by any lawful calling; to pursue any "livelihood or avocation, and for that purpose to "enter into all contracts which may be proper, neces- "sary and essential to his carrying out to a successful "conclusion the purposes above mentioned."

In the recent case of Lochner *vs.* New York, 25 S. C. R., 544, where an Act of the New York legislature, which prohibited one engaged in the trade of a baker from working more than ten hours a day, was held unconstitutional, the court said:—

"A printer, a tinsmith, a locksmith, a carpenter, a "cabinetmaker, a dry goods clerk, a bank's, a law- "yer's, or a physician's clerk, or a clerk in almost any "kind of business, would all come under the power of "the legislature, on this assumption. No trade, no "occupation, no mode of earning one's living, could "escape this all-pervading power, and the Acts of the "legislature in limiting the hours of labor in all em- "ployments would be valid, although such limitation "might seriously cripple the ability of the laborer to "support himself and his family. In our large cities "there are many buildings into which the sun pene- "trates for but a short time in each day, and these "buildings are occupied by people carrying on the "business of bankers, brokers, lawyers, real estate, "and many other kinds of business, aided by many "clerks, messengers, and other employees. Upon "the assumption of the validity of this Act under "review, it is not possible to say that an Act, pro- "hibiting lawyers' or bank clerks, or others, from "contracting to labor for their employers more than "eight hours a day would be invalid."

And at page 545 it is said:—

"If the man works ten hours a day it is all right, "but if ten and a half or eleven his health is in dan- "ger and his bread may be unhealthy, and, there-

"fore, he shall not be permitted to do it. This, we "think, is unreasonable and entirely arbitrary. When "assertions such as we have adverted to become "necessary in order to give, if possible, a plausible "foundation for the contention that the law is a "'health law,' it gives rise to at least a suspicion that "there was some other motive dominating the legis- "lature than the purpose to subserve the public "health or welfare."

And, in conclusion, the court said:—

"It seems to us that the real object and purpose "were simply to regulate the hours of labor between "the master and his employees (all being men, *sui* "*juris*), in a private business, not dangerous in any "degree to morals, or in any real and substantial de- "gree to the health of the employees. Under such "circumstances the freedom of master and employee "to contract with each other in relation to their em- "ployment, and in defining the same, cannot be pro- "hibited or interfered with, without violating the "Federal Constitution."

In Frorer *vs.* People, 141 Ill., 171; 31 N. E., 397, where persons or corporations engaged in manufacturing or mining were prohibited from operating or being interested in truck stores which furnished goods to employees, in holding this legislation unconstitutional the court said:—

"If the General Assembly may thus deprive some "persons of substantial privileges allowed to other "persons under precisely the same conditions, it is "manifest that it may, upon like principle, deprive "still other persons of other privileges in contract- "ing, which, under precisely the same circumstances, "are enjoyed by all but the prohibited class; and it can "hardly be admissible that the legislative determina- "tion that the facts are such as to warrant this dis- "crimination is conclusive, for that would make the "General Assembly omnipotent, since, if that were "so, there could be nothing but its own discretion to "control its action in regard to every liberty enjoyed

"by the citizen; and it might find that the public wel-
"fare required that society should be divided into
"an indefinite number of classes, each possessing or
"being denied privileges in contracting and acquiring
"property, as favoritism or caprice might dictate.
"The privilege of contracting is both a liberty and a
"property right, and if A. is denied the right to con-
"tract and acquire property in a manner which he
"has hitherto enjoyed under the law, and which B.,
"C., and D. are still allowed by the law to enjoy, it is
"clear that he is deprived of both liberty and prop-
"erty to the extent that he is thus denied the right to
"contract."

In State *vs.* Goodwill, 33 West Va., 179-181; 6 L. R. A., 621, where persons or corporations "engaged in mining "coal or other minerals, or any kind of manufacturing" were compelled to pay their employees in lawful money of the United States, the court, in holding the enactment unconstitutional, said (page 622):—

"It is by its terms limited to persons, corporations,
"etc., engaged in mining coal or other minerals, or
"any kind of manufacturing. While these terms in-
"clude not only all persons engaged in mining coal
"and other minerals, and all persons engaged in
"manufacturing iron and steel, but all persons en-
"gaged in any kind of manufacturing, such as the
"shoemaker, the cigarmaker, the undertaker, the dis-
"tiller, the brickmaker, the jeweler, the weaver, the
"milliner, the dairyman and the miller, it does not
"include the wholesale merchant, with his hundreds
"of clerks and agents; the railroad construction com-
"panies, or railroad companies, with their thousands
"of employees. The propriety or the necessity, if
"such exists, of applying the provisions of the statute
"to these latter is equally as great, if not more so, as
"it is to any of the former. The rights and privileges
"of certain specified employers are abridged, while
"others of the same class are left free."

It is further said:—

"The rights of every individual must stand or fall "by the same rule of law that governs every other "member of the body politic under similar circum- "stances; and every partial or private law which di- "rectly proposes to destroy or affect individual rights, "or does the same thing by restricting the privi- "leges of certain classes of citizens and not of others, "when there is no public necessity for such discrimi- "nation, is unconstitutional and void. Were it other- "wise, odious individuals or corporate bodies would "be governed by one law, and the mass of the com- "munity, and those who make the law, by another; "whereas, a like general law, affecting the whole "community equally, could not have been enacted."

In State *vs.* Fire Creek Coal & Coke Co., 33 West Va., 188; 6 L. R. A., 359, where a statute prohibiting operators of mines and manufacturers from selling supplies and merchandise to their employees at a greater per cent. of profit than to others, was held unconstitutional, the court said:—

"There are many considerations for selling goods "or supplies at less per cent. of profit to one custo- "mer than to others. The goods may be of the 'like "'character, kind, quality and quantity,' and still there "may be considerations, entirely proper, why the sale "should not be at the same pr[illegible] in all cases—such "as the character and prompt[illegible]s of the customer; "the risk of loss or time of payment; the aggregate "amount of purchases by the same person of different "kinds of goods or supplies. It may be more profit- "able to sell a large bill of different kinds of goods "to a large consumer than to sell one of the same kind "of articles to one who buys nothing else. The stat- "ute is a Procrustean bed. It consigns all sizes "and conditions to the same measure of treatment, "regardless of their differences. It excludes all free- "dom in trade, and all consideration of mutual bene- "fit, and even charity. If the employer sells goods to "the family of some friend, in indigent circumstances, "at less than cost, then, under this statute, he must

"sell at the same price to all his employees. But it is "unnecessary to illustrate the vices, the crudities and "the injustice of the statute. That it is an attempt "to do for private citizens, under no physical or "mental disabilities, what they can best do for them- "selves, is apparent. It selects miners and manufac- "turers as a class, and denies to them privileges which "are not only proper and legitimate in themselves "but to some extent necessary and unavoidable in "the conduct of business, privileges which concern "private affairs solely, and which are enjoyed by all "other classes and citizens. It is an attempt on the "part of the legislature to do what, in this country, "cannot be done; that is, to prevent persons who are "*sui juris* from making their own contracts."

In State *vs.* Kreutzberg, 114 Wis., 530; 90 N. W., 1102, a statute of Wisconsin prevented an employer from discharging an employee because he belonged to a labor organization. In holding the statute void, the court said:—

"Free will in making private contracts, and even "in greater degree in refusing to make them, is one "of the most important and sacred of the individual "rights intended to be protected. * * * We must "not forget that our Government is founded on the "idea of equality of all individuals before the law."

And further, at page 1104, the court said:—

"We have sought to give to the legislature the "benefit of every doubt. We have examined the de- "cided cases in great number; we invited counsel for "the State to suggest, and we have given loose to "our own invention and imagination; but we are "unable to discover reason to think that the legis- "lation is needful for, or even calculated to, protect "public welfare, though cogent reasons to the con- "trary readily present themselves. Those courts "which have sustained the various laws above men- "tioned, interfering in some degree with freedom of "contract, when they have discussed the subject, have

"found some respect in which the public were inter-
"ested, or thought to be."

In Harding *vs.* People, 160 Ill., 459; 43 N. E., 624, where miners of coal, who paid their employees by weight, were required by an Illinois statute to weigh in a particular manner, the court, in holding the statute void, said:—

"Each person subject to the laws has a right that
"he shall be governed by general public rules. Laws
"and regulations entirely arbitrary in their character,
"singling out particular persons not distinguished
"from others in the community by any reason applica-
"ble to such persons, are not of that class. Distinc-
"tions in rights and privileges must be based upon
"some distinction or reason not applicable to others."

And further, at page 626, the court said:—

"Here was an arrangement, amounting to a con-
"tract between the parties, with which all the con-
"tracting parties were satisfied, and the testimony
"upon which plaintiffs in error were convicted came
"from miners who left during the miners' strike of
"1894, and were not again employed by the company.
"It seems that a law whch deprives men engaged in
"the business of mining from contracting with each
"other for the purpose of ascertaining the weight of
"the coal mined, or the amount due them, in any
"manner mutually satisfactory, cannot be sustained."

In Republic Iron & Steel Co. *vs.* State, 66 N. E., 1008, a statute of Indiana, requiring weekly payment of wages for labor, was held unconstitutional, as infringing the right of private contract. In the course of the opinion the court said:—

"Any law or policy that disables the citizen from
"making a contract whereby he may find lawful,
"needed, and satisfactory employment is unreason-
"able. It may be that the workman will desire and

"request his employer, as conducive to economy and "saving, to keep back all wages not needed for cur- "rent necessities. Whether he leaves his surplus "earnings with his employer, or deposits them with "the building and loan association or with the sav- "ings bank, involves no public interest and affects no "public concern."

We, therefore, submit that this statute, prohibiting all contracts regulating rates to be charged for insurance, whether such rates are reasonable or not, and whether such agreements tend to lower instead of raising the charges which the public shall pay, is an unwarrantable invasion upon the rights of contract and the private business of providing fire insurance. The peculiar character of the business; the fact that insurance is not a prime necessity or a staple product; the fact that reasonable rates depend upon joint experiences makes some understanding and some agreement practically a necessity. The various kinds of insurance companies and the diverse ways in which they are organized—stock, mutual, and assessment companies—renders a complete monopoly of the insurance business an impossibility, and reasonable rates and safe insurance are better protected and more readily furnished where some concert of action, in the method of determining what are and what are not reasonable rates, can be had.

Even if the court does not accept as sound our contention that it is not reasonable to forbid every agreement as to rates, we submit that as the prohibition does not stand alone the whole Act must fall if it is unconstitutional in its other, most vital, provisions. These we will now consider.

(C.) *PROHIBITION AS TO AMOUNT OF COMMISSIONS ALLOWED AGENTS, AND AS TO MANNER OF TRANSACTING BUSINESS.*

It is difficult to conceive how the interests of the public can be injuriously affected by any agreement or understanding, as between insurance companies, as to the amount

of commissions to be allowed agents for procuring risks. A uniformity in this respect would tend to economy of management, and to a reduction of the charges which the public should pay.

This court, in the Ellis case, 165 U. S., 163, in quoting approvingly from the case of San Antonio Railway *vs.* Wilson, 19 S. W., 910, where the Texas Court of Appeals held a statute unconstitutional which provided that a railroad company refusing to pay its indebtedness to an employee within twenty days after demand should pay a penalty of twenty per cent. in addition to the amount due, said:—

> "But when we consider the relations of railway "companies to their own servants, both as to con- "tracts of employment and payment, we find a field "in which special legislation has no right ordinarily "to enter, and in which railways stand on the same "footing with all other corporations and persons."

There may be, and frequently is, a ruinous competition in the matter of extravagant commissions allowed to agents. Unreasonable commissions allowed agents tend to raise the rates of insurance and to increase the cost of operation. A uniform arrangement as to agents' commissions is one which the law should encourage rather than legislate against.

The same is true as to the manner of transacting fire insurance business within the State. There are many reasons why a uniform method would be for the interest of the public in their relations to fire insurance companies. Many States, by statute, require a uniform, a standard form, of policy to be issued. It would simplify matters if uniform applications were issued.

It is impossible to present any fair argument whereby the public can suffer in the matter of uniform commissions to agents or of uniform methods of transacting business. On the other hand, there are many reasons why such uniformity in the conduct of a business of this character would simplify the relations between policy holders and the company.

Section 1754 provides that—

> "it shall be unlawful for two or more fire insurance "companies * * * or for the officers, agents or "employees of such companies, to make or enter into "any * * * agreement relating to * * * the "manner of transacting fire insurance in this State."

We have heretofore asked, "Why discriminate against "*fire* insurance companies in this particular? How is it "possible to classify insurance companies in the matter of "making agreements relating to the manner of transacting "their business?"

But apart from a discrimination resting upon no proper classification, how can it be held other than an unconstitutional violation of the right to contract, to forbid all agreements relating to the manner of transacting business?

Why may not fire insurance companies agree that they will adopt a standard form of policy; that losses shall be adjusted by a Board of Adjusters mutually chosen; that all proofs made and information obtained, in case of a loss covered by the same companies, shall be furnished by one to the other; that where risks are rejected because of some derogatory facts, these shall be communicated; that the same counsel shall be retained in contesting claims; that incendiaries shall be prosecuted by mutual contributors; that the same agents to solicit insurance shall be employed; and that a thousand and one things shall be done, not injurious to the public, but mutually beneficial?

We submit that the attempt on the part of the legislature to prevent any understanding or agreement as to commissions to agents or as to methods of doing business is an arbitrary, unfair, and unreasonable, invasion of the private right of contract, and the right to conduct a private business within legitimate lines.

The record in this case presents, we believe, with controlling emphasis, the unconstitutionality of the Iowa statute. The classification of fire insurance companies, as distinguished from other insurance companies, banks, loan and building associations, and other corporations en-

gaged in trade, is arbitrary and unnatural. There are no controlling reasons why same should be made. The penalties imposed by the statute are unusual, unnecessary and unjust. The prohibition of the right of contract should not be permitted to extend to reasonable contracts. These should be sustained. The prohibition as to commissions to agents and as to the method of doing business is arbitrary in the extreme. We believe the statute is within the condemnation of this court and is contrary to the great weight of authority, as found in the decisions of other appellate tribunals.

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